



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 30, 1998

Mr. Thomas G. Ricks  
President  
The University of Texas Investment  
Management Company  
210 West Sixth Street, Second Floor  
Austin, Texas 78701

OR98-0828

Dear Mr. Ricks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 113934.

The University of Texas Investment Management Company ("UTIMCO") received a request for five categories of information. You indicate that you have released information responsive to categories 2 through 5. You claim, however, that the information requested in category 1 is excepted from disclosure by sections 552.104 and 552.110. The requestor asks for:

1. A detailed list of fees paid to managers of limited partnerships and other private investments from the Available University Fund by fiscal year, from 1988 to the present. Please include the name of the partnership, the amount of performance-based fees (carried interest), as well as the management fee amount. If the fee money came from a source other than the AUF, please indicate the source.

You have submitted a sample of the documents that you seek to withhold.<sup>1</sup> The submitted information includes three volumes of information. You explain that Volume 1 contains

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information specifically responsive to the request at issue. You have marked this information in exhibits 5, 6 and 7. This information pertains to the fees and distributions of partnership capital that UTIMCO has established with several limited partnerships or private investment vehicles. The marked information consists of a limited partnership agreement which details the formulas and arrangements used to calculate partnership distributions and management fees, a partnership statement of assets and liabilities, and a letter outlining a partner's capital contribution to a specific partnership.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. Open Records Decision No. 593 (1991) at 4. Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

In Open Records Letter No. 97-1776 (1997), we concluded that UTIMCO and the University of Texas Board of Regents with whom UTIMCO contracts have a common purpose and objective such that an agency-type relationship is created. This office has also previously determined, in the same context, that the University of Texas System may be considered a "competitor" for purposes of section 552.104. Open Records Letter No. 92-0613 (1992). Therefore, based on this relationship and after reviewing your arguments, we conclude that you have demonstrated that UTIMCO has specific marketplace interests. You also argue:

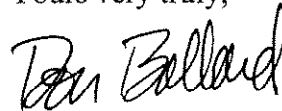
The distribution mechanisms of the various private investment vehicles included in the Program are heavily negotiated when UTIMCO and other investors desire to invest in a particular private investment vehicle. Each private investment vehicle has a different distribution structure as a result of this negotiation process. If the entire private investment marketplace was able to obtain information about a particular distribution structure of a certain private investment vehicle, both UTIMCO and the managers of the private investment vehicle, from whom the information regarding the distribution was

obtained, would lose competitive advantages they have developed due to their negotiation skills or their particular accumulation of knowledge regarding the private equity marketplace and would be placed at a material disadvantage in future negotiations with other private market participants.

Based upon our review of the submitted information and your arguments, we conclude that you have demonstrated actual or potential harm to UTIMCO's interests in a particular competitive situation. You have shown that releasing the documents will bring about a specific harm. You may withhold the information requested in category 1 of the request for information.<sup>2</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard  
Assistant Attorney General  
Open Records Division

JDB/ch

Ref: ID# 113934

Enclosures: Submitted documents

cc: Ms. Mary Ann Roser  
Higher Education Reporter  
Austin American Statesman  
P.O. Box 670  
Austin, Texas 78767  
(w/o enclosures)

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<sup>2</sup>Because we are able to make a determination under section 552.104, we do not address your additional argument against disclosure.